

February 21, 2003

Country of Origin Labeling Program
Agricultural Marketing Service
USDA Stop 0249
Room 2092-S
1400 Independence Avenue, S.W.
Washington, D.C. 20250-0249

Desk Officer
Office of Management and Budget
New Executive Office Building
725 17th Street, N.W.
Room 725
Washington, D.C. 20503

Clearance Officer
USDA-OCIO
Room 404-W
Jamie L. Whitten Building
Stop 7602
1400 Independence Avenue, S.W.
Washington, D.C. 20250-7602

Re: Comments on Country of Origin Labeling Guidelines
Notice of Request for Emergency Approval of a New Information Collection
Federal Register: November 21, 2002 (Volume 67, Number 225)

Dear Sir or Madam:

This comment responds to the Notice and Request for Comment published by the USDA Agricultural Marketing Service [Federal Register: November 21, 2002 (Volume 67, Number 225)] relating to the Establishment of Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts Under the Authority of the Agricultural Marketing Act of 1946. Comments were specifically invited on the following issues:

1. Whether the recordkeeping is necessary for the proper operation of this voluntary program, including whether the information would have practical utility;
2. The accuracy of USDA's estimate of the burden of the record keeping requirements, including the validity of the methodology and assumptions used;
3. Ways to enhance the quality, utility, and clarity of the records to be maintained; and
4. Ways to minimize the burden of the recordkeeping on those who are to maintain and/or make the records available, including the use of appropriate automated,

electronic, mechanical, or other technological recordkeeping techniques or other forms of information technology.

Introduction

The Organization for Competitive Markets is a multidisciplinary, nonprofit membership organization that works to increase competition in the agricultural markets. We engage in research, education and advocacy on behalf of agricultural producers of all commodities. Our members consist of farmers, ranchers, policy makers, academics, and agricultural businessmen. We are national in our membership and our activities.

The fundamental point made in these comments is that the labeling program can be made extremely simple, effective and low cost through focusing record keeping requirements upon those areas in the flow of covered commodities, which are most complex in relation to the program. These complexities arise where the covered commodities pass through more than one country for labeling purposes. However, the vast majority of the covered commodities are produced in the United States thereby simplifying the process. Additionally, most imported products are currently labeled and involve only one country other than the United States, again making the verification process quite simple.

Lastly, OCM believes that the cost estimates produced by the USDA Agricultural Market Service were excessively high for the reasons set forth below. We believe that, upon further reflection, AMS will revise these figures downward significantly.

1. Whether the recordkeeping is necessary for the proper operation of this voluntary program, including whether the information would have practical utility.

For the following reasons, the record keeping requirements contemplated by the USDA Agricultural Marketing Service are more burdensome than necessary for a voluntary labeling program.

A. Producers of the precursors to the covered commodities are not regulated entities under the Act. Further, producers of actual covered commodities are not regulated entities unless they sell directly to a retailer.

The labeling provisions of the Farm Security and Rural Investment Act of 2002 (the Act) require retailers to inform consumers as to the country of origin of the covered commodities.¹ The Act allows the Secretary to regulate the activities of person that prepare, store, handle or distribute covered commodities.² The act also requires those who supply a covered commodity to retailers to provide information to the retailer indicating the country of origin.³ The Act does not allow the USDA to regulate persons producing precursor commodities, i.e. cattle, hogs and lamb, in commerce. Further, Congress did not provide USDA with the authority to regulate producers of actual covered commodities unless they supply them directly to retailers. The

¹ Farm Security and Rural Investment Act of 2002, Subtitle D-Country of Origin Labeling, Sec. 282(a)(1).

² Id., at § 282(d).

³ Id., at § 282(e).

USDA appears to have made a mistake in listing “producers” of covered commodities in its record keeping requirements as set forth on page 63374 [“Recordkeeping” subsection B] of the Voluntary Guidelines published October 11, 2002.

Covered commodities under the act include: (1) muscle cuts of beef, lamb and pork; (2) ground beef, ground lamb, and ground pork; (3) farm raised fish; (4) wild fish; (5) perishable agricultural commodities; and (6) peanuts.⁴ Livestock are not designated as a covered commodity. Congress must be presumed to know the difference. The USDA-AMS also knows the difference as evidenced in the proposed rule on voluntary labeling published October 11, 2002 in which “pork” is defined as meat produced from hogs; “beef” is defined as meat produced from cattle; and “lamb” is defined as meat produced from sheep.⁵

Congress also distinguished between livestock and meat produced from livestock in other statutes including the Packers & Stockyards Act. Section 182 of Title 7 defines “livestock” as “cattle, sheep, swine, horses, mules, or goats” as distinguished from “meat food products.” In 1999, Congress added section 221 to the Packers & Stockyards Act relating to Swine Packer Marketing Contracts that defines “pork” as the meat of a porcine animal while “swine” is an actual porcine animal. The USDA does not and cannot regulate producers of livestock under the Packers & Stockyards Act.

Similarly, USDA-AMS cannot exceed its statutory authority with regard to the classes of regulated entities in this Act. The Act does not contain the word “producer.” The Act does not cover livestock. Further, producers of fish, perishable commodities, and peanuts are not covered persons unless they are a direct seller to a retailer. However, if a person is both a “producer” of, for example, fruits and a seller of fruits directly to a retailer, then that person is within the Act and subject to the jurisdiction of the USDA.

Therefore, the USDA-AMS should delete all reference to producers in its final rule dealing with labeling guidelines as beyond its statutory authority.

B. The USDA’s voluntary labeling record keeping system can be made extremely efficient by presuming that covered commodities originate exclusively in the United States unless shown otherwise.

1. USDA should allow a presumption of domestic produced product unless identified otherwise.

The vast majority of meat produced in this country is derived from domestically produced and processed livestock, with the exception of lamb. Thus, most meat is eligible for the label of U.S. origin. However, USDA is allowed (not mandated) under the Act to require a verifiable recordkeeping audit trail for covered entities.⁶ Further, the Act requires those who

⁴ Id., at § 281(2).

⁵ Federal Register, Vol. 67, No.198 (October 11, 2002), pg. 63372, section on Definitions.

⁶ The Act, supra, at §282(d).

supply retailers to provide such information to the retailers.⁷ The issue is the level of proof necessary to constitute “verification.”

USDA, through its regulatory discretion, can prescribe the level of proof it deems appropriate to constitute information sufficient to give rise to an accurate label. In doing so, USDA can make policy decisions based upon an evaluation of the least problematic, and most problematic, areas for such labeling.

Because domestically produced and processed product is the most common scenario, the USDA can and should determine that a presumption of domestic origin will apply unless there is information showing otherwise. The regulations should provide that the absence of information as to origin of the product will be considered affirmative evidence that the product is of domestic origin and, therefore, eligible for the label of full U.S. origin.

This presumption can be established in the context of other rules that require the reporting and tracking of products from other countries, as discussed below.

2. USDA should prescribe affirmative duties to track products from other countries by integrating labeling verification processes with pre-existing programs that track imported food products.

The focal point of any affirmative record keeping or verification requirements should be upon the products from other countries. Such information would then rebut the presumption of domestically produced and processed product for labeling purposes. Further, the record keeping necessary would be limited only to those products.

This scenario is a rational policy choice to conserve both public and private resources. The presumption of domestic origin is reasonable because, as a matter of proven fact, most covered commodities are of domestic origin. Further, most imported products are already being tracked under other laws. The USDA can and should choose to merely piggy back the record keeping processes relating to labeling to the pre-existing recordkeeping being done for other reasons today.

This proposed verification standard is not discriminatory as to imported product because such products are already being identified for purposes other than labeling, such as customs rules, safety rules, etc. This proposal does not alter the ultimate result which is a label depicting the country or countries of production and processing. It merely creates a reasonable procedure for verifying that the ultimate label is accurate.

In sum, the least cost alternative verification procedure would include an administrative presumption of domestically produced product combined with the affirmative duty to track and identify product from other countries.

2. Is the USDA’s estimate of the burden of the record keeping requirements, including the validity of the methodology and assumptions used; accurate?

⁷ Id., at §282(e).

OCM believes that the initial cost estimate created by USDA-AMS is too high. Further reflection will allow a refinement of this estimate revealing that the costs are far less than initially thought.

USDA-AMS initial cost estimate claimed a potential industry burden of \$1,967,750,000. This was based upon assumptions as to numbers of producers, food handlers, and retailers; the number of hours required for compliance; and the hourly wage. All these components appear to be too high.

A. The cost estimate as to producers is too high.

First, AMS assumed that nearly all commercial farms (a) produce covered commodities; (b) are regulated entities; (c) will participate in the voluntary program, (d) and pay \$25 per hour for record keeping duties. These assumptions are incorrect.

All farms do not produce livestock, fish, peanuts or perishable commodities. Many farms produce grains and oilseeds, cotton, and other products not covered by the act. The National Agricultural Statistics Service reports that there are 1.03 million cattle producers (2003), 75,350 hog farms (2002), 64,170 sheep and goat farms (2002), 12,221 peanut farms (1997), 106,069 fruit and nut farms (1997), and 53,717 vegetable farms (1997). Nearly one-half the cattle production operations have less than 100 head, and are part time operations.⁸ The total of covered operations is, thus, about 1.35 million rather than the 2 million originally anticipated. This change alone reduces the initial estimate by nearly 33%.

As argued above, these operations cannot be made to comply with any USDA guidelines unless independent authority to do so is involved under other laws, such as those relating to imported products and safety and health rules.

Additionally, it entirely incorrect to assume that all farms will participate. It is more probable than not that less than half will participate. If the USDA decides to propound guidelines that create a presumption of domestic origin, very few of these farms will need to maintain records.

Lastly, the Bureau of Labor Statistics median wage for farming is \$7.76 per hour, not \$25 per hour. This change alone reduces the estimated cost by 69%.

Thus, further analysis of the actual wages in the production sector, and the actual number of producers of covered commodities or precursors thereto, reduces the initial cost estimate to \$19.71 million dollars. If USDA chooses to presume that covered commodities are domestically produced unless identified otherwise, the cost becomes extremely small.

B. The cost estimate as to handlers is too high.

Food handlers include packers, processors, importers, wholesalers, and distributors. The USDA assumed that there are 100,000 such handlers. The number of handlers is probably too

⁸ ERS Ag Outlook, "Where's the Beef: Small Farms Produce the Majority of Cattle," December 2002.

high because of overlap with retailers. It was also assumed that they would spend 2 days to develop a record keeping system and one hour per week to maintain the records. AMS further assumed an hourly rate of \$50.

However, the Bureau of Labor Statistics median for the relevant work category here is \$13 per hour. This cuts the estimated cost from \$340 million to \$88.4 million for the first year. Additionally, if the presumption of U.S. origin utilized for domestic products, that cost would become far less.

(Estimated burden for food handlers to develop a recordkeeping system would be 100 food handlers x \$13 per hour x 16 hours, or \$20.8 million. In addition maintaining the records would be 100,000 food handlers x \$13 per hour x 52 hours, or \$67.6 million. Therefore, the total potential burden of this program on food handlers in the first year could be \$20.8 million + \$67.6 million, or \$88.4 million.)

C. The cost estimate as to retailers is too high.

The USDA estimated that there are 31,000 retailers covered under the Act and that they will be burdened by a \$625.75 million first year cost. The estimate was based, in part, upon an estimated hourly wage of \$50 per hour. The median Bureau of Labor Statistics wage rate for retail food workers is approximately \$9 per hour with supervisory staff at about \$24.75. It is most likely that the majority of the record keeping and other related duties will be done by ordinary retail workers. Assuming that to be the case, \$132.53 million dollars would seem to be a more appropriate and realistic cost estimate.

(Estimated burden for retailers to develop a recordkeeping system that would comply with these guidelines to be 31,000 retailers x \$24.75 per hour x 40 hours, or \$30.69 million. In addition the burden to generate and maintain the records required would be 31,000 retailers x \$9 per hour x 365 hours, or \$101.84 million. Therefore the total potential burden of this program on retailers in the first year could be \$30.69 million + \$101.84 million, or \$132.53 million.)

D. The USDA can reduce costs by prescribing forms and utilizing existing record keeping procedures used in industry.

The USDA estimates assume that retailers will create their own systems for verification and compliance. However, USDA should produce the forms that meet the minimum requirements of the future labeling standards for all parties. This would reduce much of the cost of creating such a compliance system.

Additionally, USDA should look to existing information collection and maintenance procedures in the industry, whether voluntary or mandated, to conform the eventual guidelines to harmonize with what is happening now.

E. The USDA failed to estimate benefits.

The USDA did not estimate the benefits of labeling to offset, partially or totally, the costs. We understand that the Paperwork Reduction Act only required an analysis of costs. However, for good policy, the USDA can and should include the benefits of labeling and estimate their actual value.

In our view, labeling can lessen the costs of future food recalls caused by safety problems with imported products. If there were a pesticide residue or food safety issue with another countries product, it would be far easier to perform a recall effort or isolate the product in certain plants.

Further, consumers appear to view the label as enhancing the perceived utility of the product sold. Consumers would feel confident and protected if they were to have that information. Therefore, confidence in the food supply could very well increase.

3 and 4. Ways to enhance the quality of, or reduce the burden of, the records.

OCM discussed above that the USDA has the authority to create presumptions of domestic origin of covered commodities. This is basic information that is not complicated. Any enhancement of record keeping should come through the USDA creating boilerplate forms and processes for industry participants to use.

CONCLUSION

The Organization for Competitive Markets view Country of Origin Labeling as a critical step forward in providing food consumers with more meaningful information and in differentiating foods from various sources with their differing real values.

The implementation of this program need not be overly burdensome or costly. If food products and animals coming into the United States are properly identified and tracked, it seems logical to assume that all other products and animals are of U. S. origin. We believe the USDA AMS cost estimate is exaggerated and envisions procedures that would be unnecessarily burdensome.

For all the foregoing reasons, the USDA should revise its cost estimate downward, exclude most producers from the scope of its rules, and implement a least cost alternative. Thank you for the opportunity to comment.

Thank you for the opportunity to comment.

Very truly yours,

Fred

Thomas F. "Fred" Stokes
President